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No. 71-543

In the Supreme Court of the United States

OCTOBER TERM, 1971

LARY VON ZAMPT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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An indictment returned in the United States District Court for the Southern District of Florida charged petitioner in three counts with aiding and abetting Mrs. Carolyin Copher, executive secretary of a local selective service board, to accept bribes for Selective Service deferments, in violation of 18 U.S.C. 201. Petitioner was convicted on counts one and two and sentenced to concurrent terms of imprisonment for four years. He was acquitted by the jury on count four. The court of appeals affirmed *per curiam* without oral argument (Pet. App. B).

The evidence against petitioner was primarily provided by the draftees involved. James Meni (count 1)

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testified that after he lost his occupational deferment he spoke with Mrs. Copher and she suggested that petitioner might help him (Tr. 42–56). Meni thereafter met with Copher and petitioner; at this meeting petitioner said that a deferment would cost $1,000, and Meni said he could pay only $500. Petitioner told Mrs. Copher he would take $200 and she could have $300. The next day Meni met Mrs. Copher and gave her a post-dated check for $500 and received his new classification deferring him from service (Tr. 56–64). Brotman (count 2) testified that he met with Mrs. Copher to discuss his classification. She said she knew someone who might help him and referred him to petitioner (Tr. 139–141). Brotman contacted petitioner who told him that he could obtain any deferment that Brotman wished for a fee of $1,000 (Tr. 142–145). At a subsequent meeting, Brotman paid petitioner $1,000 and received a draft card granting him a I–Y classification (Tr. 146).[1]

1. Petitioner contends that it was error to admit the testimony of the draftees as to conversations, negotiations and arrangements made with Mrs. Copher out of the presence of petitioner. This claim is insubstantial. Statements made during and in furtherance of the scheme by those engaged in an illegal joint enterprise—as were petitioner and Mrs.

[1] Rogge (count 4, upon which petitioner was acquitted) testified that he also spoke with Mrs. Copher at the draft board about his deferment; that she told him getting a deferment could depend on whom one knew; and that she put him in contact with an individual who looked very much like petitioner to whom he paid $2,000 in return for a deferment (Tr. 209–215).

Copher—are admissible against the others, whether or not a conspiracy is charged. *E.g., United States* v. *Rinaldi*, 393 F. 2d 97, 99 (C.A. 2), certiorari denied, 393 U.S. 913; *United States* v. *Spencer*, 415 F. 2d 1301, 1304 (C.A. 7); *United States* v. *Branker*, 418 F. 2d 378, 380 (C.A. 2); see *Dutton* v. *Evans*, 400 U.S. 74.[2]

2. At the trial, the government called Mrs. Copher as its first witness. Over defense objection, she testified that she had pleaded guilty to count one of the indictment (Tr. 32). The district court found this testimony admissible on the ground that the government had to prove the commission of the basic offense which petitioner was charged with aiding and abetting (Tr. 26–27). That the trial judge did not instruct that Mrs. Copher's admission of guilt could not be

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[2] Petitioner also contends that it was error for the court not to give his requested accomplice instruction limiting the testimony of Meni, Brotman, Rogge and Copher. Failure to give an accomplice instruction constitutes reversible error only in close evidentiary situations. See *Davis* v. *United States*, 411 F. 2d 1126, 1128 (C.A. 5); *Tillery* v. *United States*, 411 F. 2d 644, 647 (C.A. 5); Cf. *Caminetti* v. *United States*, 242 U.S. 470, 495. Here the evidence was not close on the counts upon which petitioner stands convicted. The draftees (Meni and Brotman) testified unequivocally that they met with petitioner concerning their draft status and that, without hesitation, he agreed to obtain deferments for them in exchange for a fee. The trial judge did instruct the jury that "[i]n weighing the testimony of each witness the jury should consider his relationship to the Government, or to the defendant; the witness's interest, if any, in the outcome of the case; his manner of testifying; his candor, fairness and intelligence; and the extent to which he has been corroborated or contradicted if at all, by other credible evidence." (Tr. 341–342).

considered against petitioner was harmless error in the circumstances of this case.[3] Mrs. Copher's admission of a plea of guilty went only to count one, and petitioner received concurrent sentences on that count and count two. Moreover, as noted, Mrs. Copher's testimony as to the plea came very early in the trial before the draftee witnesses testified. That the jury focussed on the testimony of the draftees and not that of Mrs. Copher is shown by its acquittal of petitioner on count four, where the draftee involved was not absolutely positive of his identification of petitioner as the man to whom he gave the money.

3. Petitioner's other contentions (the details of which are set forth at pages 11 and 12 of the petition) are also without merit. For example, petitioner contends that it was error for the trial court to refuse to require the production of the grand jury testimony of the witness Rogge. At the time of petitioner's trial,[4] absent a showing of a particularized need, the production of grand jury minutes was not required. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395. Petitioner made no showing of a particularlized need (Tr. 237). Another contention is that the court erred in limiting the number of character witnesses called in petitioner's defense. It is clearly within the

[3] The government so argued in the court of appeals and while that court wrote no opinion, its affirmance justifies the conclusion that it agreed with the government's submission.

[4] In October 1970, subsequent to petitioner's trial in June 1970, 18 U.S.C. 3500 was amended to require the production of minutes of the grand jury testimony of a witness at the conclusion of his direct testimony.

court's discretion to limit the number of such witnesses. *Michelson* v. *United States*, 335 U.S. 469, 480; *United States* v. *Baysek*, 212 F. 2d 446, 447 C.A. 3), certiorari denied, 348 U.S. 836.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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